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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

Nos. 77-955 & 77-1129

James M. Powell, Chief, U.S. Capitol Police,
Petitioner,

v.

Honorable Ronald V. Dellums, *et. al., Respondents*

[No. 77-955]

Jerry V. Wilson, Chief, D.C. Metropolitan Police Department, and District of Columbia, *Petitioners,*

v.

Honorable Ronald V. Dellums, *et al., Respondents.*

[No. 77-1129]

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The International Association of Chiefs of Police (IACP) hereby respectfully moves the Court for leave to file a brief *amicus curiae* in support of these Petitions for Writ of Certiorari.*

In the IACP's view: The public importance of the matters implicated here warrants "all the light that can be derived from the fullest discussion" before this Court. See *The Gray Jacket*, 5 Wallace (72 U.S.) 370, 371. Furthermore, the "plain errors" not presented by petitioners—apparent in the trial rulings of the district court—were sanctioned by the court of appeals majority below. These errors so prejudiced the entire jury trial as to justify this Court, in the interest of fundamental justice, to set aside the shocking jury verdict and judgment entered in the case. See Rule 40(d)(2) of the Rules of this Court; *Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 402 U.S. 313, 319-320 (including fn. 6, at 320-321); *Hormel* v. *Helvering*, 312 U.S. 552, 557.

STATEMENT

The IACP is a voluntary professional organization, established in 1893 to further the science of police administration. It comprises chiefs of police and other law enforcement personnel from all parts of the United States and 54 foreign countries. Command personnel in the United States make up over 70% of its some 11,000 members.

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*The IACP earlier sought the consent of the parties in No. 75-955 to this filing. Consent was refused. The Solicitor General of the United States, representing petitioner James M. Powell, withheld consent on the basis of a desire not to delay this Court's earliest possible consideration of the petitions. In light of the fact that no action has yet been taken upon the petitions, and furthermore, due to the public importance of the matters involved here, the IACP has determined now to seek this Court's leave. The IACP submits that the supervening public interest involved justifies this Court's granting its leave. *Cf.* Rule 20 of the Rules of this Court.

In the IACP's view: At the crux here are the most shocking illegal "mob-action" activities employed during "Mayday" in an attempt to force political concessions from our free society.[1] These were the preplanned and openly avowed "Mayday," 1971, "Stop-the-Government" activities in and about the Nation's capital city. The violent "Stop-the-Government" activities perpetrated during the week of "Mayday," 1971 in the streets and other public places in and about Washington, D.C., included the preplanned and openly avowed "mob-action" tactics, described as being a "siege" laid upon the Congress of the United States while in legislative session, to continue until all the demonstrators were arrested, on May 5, 1971.[2]

Under the indicated necessitous circumstances, Chief of U.S. Capitol Police James M. Powell, the petitioner in No. 77-955,[3] was called upon in line of duty on May 5, 1971, to execute steadfastly his command responsibility to maintain the public

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[1]By the term, "mob-action" activities, the IACP refers to such concerted conduct resorted to in mass demonstration situations as persons lying or sitting down in an obstructive way in public places (often accompanied by their going limp when sought to be removed, or physically resisting their removal); the occupying of public offices and buildings; the obstructing of traffic; the blocking of public entrances, as well as the damaging of property, the throwing of stones, bricks, etc., and the use of staves and other cudgels. While such concerted activities have been engaged in to express dissent and protest, in the IACP's view they nevertheless fall within the reach of the settled common-law principles governing the control of unlawful assemblies, rout and riot. They are beyond the pale of *peaceable* assembly and petition within the meaning of the First Amendment. Most clearly, the Constitution extends *no* protection to the intimidatory use of such "mob-action" tactics deliberately and avowedly employed to "blackmail" or otherwise force concessions from our constituted authorities.

[2]In *United States* v. *Buckley*, Criminal Nos. 22164-71 A&B, the Superior Court of the District of Columbia (per Greene, C.J.) contemporaneously made "common-knowledge" observations, and took proper judicial notice, as to the "Mayday," 1971, "mob-action" outrages perpetrated in the Nation's capital. That court concluded that "the widely advertised purposes of the *** ["Mayday," 1971, demonstrators]*** were not constitutionally protected speech, symbolic or otherwise." "They were plainly illegal***."

[3]The petitioners in No. 77-1129 are D.C. Metropolitan Police Chief Jerry V. Wilson and the District of Columbia. As the IACP understands the true matter here, Chief Wilson did *not* personally participate in the making of Chief Powell's command decision brought into question here. And the District of Columbia has been here held liable solely on a *respondeat superior* basis.

peace and good order at the U.S. Capitol, and to protect against unlawful interference with the processes of the Congress of the United States while in legislative session. He then made his command decision, brought into question here, by which he ordered the dispersal, or failing that, the arrest of some 1,100 demonstrators massed (and entirely occupying) the East House steps of the U.S. Capitol. The judgment he then reached was that at the moment of decision he was faced with an unlawful assembly on the House steps, tumultuously breaching the peace at the U.S. Capitol, excessively disturbing the processes of the Congress while in legislative session, and on the verge of getting out-of-hand. In the context of all the pertinent circumstances prevailing at the moment of decision, the crowd's conduct was well within the reach of the "unlawful assembly" provisions of the Capitol Grounds Statute.

Chief Powell made that command judgment with the full concurrence of his experienced legal advisor standing by his side (there at his request), to advise him in the matter of the proper applicability of the *Nicholson* determination of the D.C. courts (which had been accepted by the U.S. Capitol Police Board as binding upon the Capitol Police authorities). Prior to taking his command action in the matter, Chief Powell duly consulted with and secured the approval of the House Sergeant-at-Arms. And, through the Sergeant-at-Arms, he then also secured the authorization of the Speaker of the U.S. House of Representatives for Chief Powell to do whatever in his, Chief Powell's, judgment was required to effect the removal of the massed tumultuous demonstrators from the House steps—including their arrest if necessary.

The trial judge here made a plain legal error in misreading the true reach of *Nicholson* under the pertinent circumstances affecting the command judgment Chief Powell made on May 5, 1971. He further fundamentally erred as a matter of law in failing to give proper effect, in the context of all the pertinent circumstances here, to the settled common-law principles governing the control of unlawful assemblies, rout and riot, in full force and effect in the District of Columbia. He also fundamentally erred in placing the burden of proof upon Chief Powell, Chief Wilson and the District of Columbia, the petitioners herein. Considering these plain matter-of-law errors, this Court should conclude that "probable cause" appears to sustain Chief Powell's command decision and arrest action.

under all the pertinent circumstances. Accordingly, a directed verdict should have properly been granted by the trial judge in favor of Chief Powell, Chief Wilson and the District of Columbia. See *Kelley* v. *Southern Pacific Co.*, 419 U.S. 315, 323.

Moreover, the trial judge made plainly erroneous, highly prejudicial, reversible departures from the accepted and usual course of judicial proceedings, sanctioned by the court of appeals majority below. These consisted of (i) his excluding highly pertinent evidence proffered on petitioners' behalf, and (ii) his permitting voluminous, irrelevant and highly prejudicial "conspiracy" evidence adduced against petitioners to remain before the jury, despite his last-minute dismissal of the "conspiracy" claim. These plain errors operated to the great prejudice of petitioners, and so affected the entire jury trial, as to warrant this Court to set aside the shocking jury verdict. See *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690, 708, 709-710; *Pierson* v. *Ray*, 386 U.S. 547, 557-558.

The basic error of the court of appeals majority (Wright & Leventhal, JJ.) in sanctioning these plainly erroneous, reversible, trial court errors was done over Judge Tamm's vigorous dissent. In substance, Judge Tamm correctly addressed the fundamental error involved in the trial judge's plain misreading of the reach of *Nicholson*, under all the pertinent circumstances here, and in light of the settled common-law principles governing the control of unlawful assemblies, rout and riot. In his dissenting opinion, Judge Tamm referred (in fn. 1) to the Mayday "Tactical Manual" published and distributed by the Mayday, 1971, demonstrators. J.A. 2456-79. He noted that this Manual "made it quite clear that the singular objective" of the Mayday demonstrators' illegal efforts "was to close down the federal government," and that it called "for all the people who had not been arrested on May 3 or 4 to move to the Capitol *** [and there] to lay a nonviolent siege demanding that Congress ratify the people's Peace Treaty and to remain there until the Treaty was ratified or all were arrested." J.A. 2460, 2464.

In the IACP's view: The continuation and preservation of our ordered society, under the law, and the steadfast maintenance of the public peace in our communities, both national and local, without regrettable injuries or bloodshed in any future similar situations, may well depend upon where this Court marks the line of appropriate action in this type of case. The gravamen of the issue presented herein is at what point the police may take

appropriate law enforcement action, wihtout abridging the right of peaceable assembly and petition within the meaning of the First Amendment. The IACP urges that when serious breaches of the public peace imminently threaten or actually occur, it is a well settled principle that the paramount interest of society lies in the steady effectuation by the police authorities of the public peace and good order in the face of deliberate concerted mass breaches thereof.

The IACP is further concerned with achieving the proper fulfillment by our chiefs of police (and other command level personnel) of their duty fearlessly and conscientiously to make the command judgments they must, and to carry out the responsibilities vested upon them, under such difficult circumstances as were involved in the Mayday, 1971, demonstrations. In this regard, the IACP considers this Court's clear enunciation herein of the apposite immunity doctrine to be urgently required for future prompt, fearless and conscientious command judgments to be made under any similar necessitous circumstances.

The IACP further has a deep interest herein in this Court's forthright righting of the manifest personal injustice here done to Chief Powell and Chief Wilson, two good and honorable police chiefs, by an opprobrious jury verdict based upon plainly erroneous trial court legal rulings and instructions, which in good conscience and the proper application of law this Court should not permit to stand.

Accordingly, the IACP seeks by its brief *amicus curiae* to aid this Court secure the benefit of "all the light that can be derived from the fullest discussion" of the aforesaid matters.

Respectfully submitted,

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